

MONTANA PUBLIC DEFENDER COMMISSION

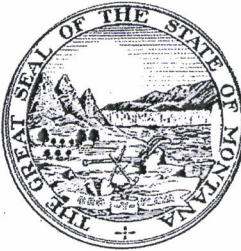
SENATE FINANCE & CLAIMS

Exhibit No. 27

Date 4-8-13

RE: CHARLES "FRANK" GILLESPIE
CHAIR

Bill No. HB 2



STEVE BULLOCK
GOVERNOR

STATE OF MONTANA

PROGRAM 1 (Public Defender Program)

CONSTITUTIONAL OBLIGATION

Each Legislator, the Governor, and every Judge takes an oath to uphold the Constitution of the United States and the Constitution of Montana.

Every one of them taking that oath promises to fulfill the constitutional duty of the State of Montana to provide effective assistance of counsel for indigent persons accused of crime and other persons in "civil" cases who are entitled by law to the assistance of counsel at public expense.

In 2005, the Legislature and the Governor created the statewide Office of the Public Defender [OPD] to carry out the State's constitutional duty of providing effective assistance of counsel for those who qualify.

It now seems universally recognized that OPD has never been adequately funded to perform that constitutional duty of the State.

The State of Montana will fail at the performance of its constitutional duty during the next biennium if the funding of OPD remains at the current HB2 level,

UNLESS OPD lawyers refuse to take new case assignments, as they are ethically bound to do by the Montana Rules of Professional Conduct, when their caseload prevents them from providing effective assistance of counsel. Judges should not violate their Code of Judicial Conduct by trying to force OPD lawyers into breaching their ethical duties and responsibility.

Refusing new case assignments will disrupt the criminal justice system in many and various ways: extended incarceration in overcrowded jails at considerable public cost; court hearings and trial delays; wrongful convictions with costly appeals and retrials on reversal that limit closure for crime victims who must relive the ordeal on remands to do cases over for denial of constitutional and statutory rights; dismissals of cases for denial of speedy trial; loss of revenue from fines and fees; putting the safety of the public and the protection of property at risk for failure to prosecute accused who do not have counsel available for representation; litigation against the State for violations of a defendant's rights that may cost thousands or millions in damages; and/or costs of litigation seeking to enforce constitutional rights.

EFFECTIVE ASSISTANCE OF COUNSEL

Effective representation by a public defender at the trial level ethically, fundamentally, and minimally requires:

- Gathering, examining, and studying the evidence the prosecution is going to use;
- Communicating with the client on a regular basis;

- Gathering evidence the defense should offer, hopefully with the help of an investigator;
- Interviewing witnesses (much of which should be done by an investigator for practical and ethical reasons);
- Analysis of the merits of the plea to be entered, motions to file, going to trial or entering a plea to a charge, perhaps to some lesser included offense;
- Advising the client on a recommended course of action founded on a thorough evaluation and understanding of the facts and the law.
- Reserved for the accused to decide are what pleas are to be entered, whether to accept a plea agreement, whether to waive a jury trial, whether to testify, and whether to appeal.

ETHICAL OBLIGATIONS OF ATTORNEYS AND MANAGEMENT

All attorneys are bound by the Montana Rules of Professional Conduct, and all are subject to the disciplinary jurisdiction of the Montana Supreme Court.

Discipline, up to and including disbarment, may be imposed for any of a number of reasons, including “[a]cts or omissions by a lawyer... which violate the Rules of Professional Conduct or the disciplinary rules adopted from time to time by the Supreme Court.” 2011 Rules for Lawyer Disciplinary Enforcement, Rules 7, 8(a).

Counsel has a duty to avoid conflicts of interest (Rule 1.7)

An attorney shall not represent a client if “the representation will result in violation of the rules of professional conduct or other law[.]” (Rule 1.16)

“A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.” (Rule 1.16, Comment 1)

“When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.” *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1135 (Fla. 1990).

“No exception exists to the ethics rules for lawyers who represent indigent persons. To the contrary, as the American Bar Association has aptly noted, there is an ‘implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules.’” Am. Bar Assn., *Eight Guidelines of Public Defense Related to Excessive Workloads*, August 2009, at 11. For this reason, ‘public defenders are risking their own professional lives’ when appointed to an excessive number of cases.” *State ex rel. Mo. Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012).

CLIENT BASE – WHOM DO WE REPRESENT UNDER M.C.A. §47-1-104?

A. Statutory Right to Counsel Based on Financial Inability to Retain Counsel.

Assignment of counsel in one subset of cases depends on a determination that the potential client is financially unable to retain counsel:

- A person charged with a felony or a misdemeanor for which there is a possibility of incarceration;
- A party in a parentage proceeding;

- A parent, guardian or custodian of a child in a removal, placement or parental-rights termination case, and as required under the federal Indian Child Welfare Act;
- An applicant in a sentence review proceeding;
- A person in appeal, postconviction relief or habeas action; and
- Persons involved in involuntary mental commitment proceedings.

B. Statutory Right to Counsel without Consideration of Financial Ability to Retain Counsel.

- As provided in § 41-3-425, MCA: the court shall appoint counsel for any child when a guardian ad litem is not appointed;
- For a youth in proceedings in youth court;
- For a minor who petitions for a waiver of parental notification requirements in order to obtain an abortion;
- For a respondent in involuntary commitment proceedings; and
- For a person who is the subject of a petition for the appointment of a guardian or conservator under Title 72 of the laws of Montana.

OPD AUTHORIZED STAFFING (PERMANENT AND MODIFIED)

OPD is staffed by:

18.25 central office/services staff

124.25 staff attorneys (including regional managers and the appellate)

57 legal office support staff

19.5 investigators

.5 conflict coordinator

0 commission support (*M.C.A. §2-15-1028(6)(b)*)

Total: 209.50 permanent and 11.00 modified (only 8 of the latter have been approved to date, 2 of which are funded out of the *M.C.A. §47-1-110* OPD special revenue account earmarked in *M.C.A. §2-15-1028(6)(b)* for funding commission support staff)

CASES

In FY 2012, the Public Defender Program opened 30,912 new cases, which reflected an increase of 11.7% over FY 2011. 11,456 new cases were opened in district courts (an increase of 1,469 cases) and 19,456 new cases in lower courts (an increase of 1,779 cases).

At the end of FY 2012, OPD had 17,810 active cases. The most recent data shows that OPD currently has approximately 19,500 active cases, and is showing a 4% growth in FY 2013.

CONTRACT ATTORNEY RESOURCE

OPD utilizes a contractor pool of about 193 private attorneys, who, at their choice, handle cases by assignment on a contract basis. This permits relief of some of the stress on the system caused by excessive caseloads. However, even at \$60 per hour, a sizeable portion of OPD's budget goes to pay contract attorneys. In FY 2012, OPD paid private counsel \$5.8 million.

A contract attorney is more expensive per hour than a staff attorney (\$60 v. \$35).

Private attorneys also are available to take cases which pose a conflict to OPD staff attorneys. The contract and conflict systems are independent, and are administered by full-time attorneys. The Conflict Coordinator assigns about 90 cases per week or over 4,000 a year.

OPD cannot substantially increase the number of cases assigned to private counsel.

There are not sufficient numbers of qualified private counsel in every region to take additional cases, in part because they cannot afford to work at \$60/hour.

Overburdening those who accept assignments creates the same excessive caseload problems, and poses the same risks to clients, as are faced by staff attorneys and managers.

WORKLOAD ASSESSMENT

- OPD uses a case weighing system, which requires daily tracking of case assignments, generation of summary reports, and monitoring of each attorney's monthly case rates by supervising attorneys. The system is based in part on the time in which counsel could reasonably be expected to resolve the various types of cases assigned. Cases are to be valued and hours are to be tracked and entered daily. A monthly report is generated, and the attorney is to review the report monthly. Critically, under this system, when an attorney's monthly hours reach 125, the regional deputy or managing attorney must meet with the attorney to discuss the attorney's caseload. After any necessary adjustments, the attorney and managing attorney sign and date the monthly report and submit it to the central office.

- The case weighting system employed by OPD is essentially the equivalent of the nationally recommended maximum annual caseload levels to not exceed 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, or 200 Mental Health Act cases per attorney per year. See National Advisory Commission on Criminal Justice Standards and Goals, Courts, 13.12 (1973) and American Council of Chief Defenders Statement on Caseloads and Workloads (2007). A study of *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, 16-17 (American Bar Association Standing Committee on Legal Aid and Indigent Defendants 2011) by Professor Norman Lefstein is also worthwhile reading.

- Today, virtually all OPD staff attorneys exceed the 125 hour "red flag" limit.